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No. 92-1886

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOE B. HUDDLESTON, in his capacity as Commissioner of Revenue of the State of Tennessee, and CHARLES W. BURSON, in his capacity as Attorney General of the State of Tennessee,

Petitioners,

v.

BLOOMINGDALE'S BY MAIL LTD.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

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MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

INTRODUCTION

The petition for a writ of certiorari fails to show any reason why this Court should review the decision below. The Tennessee Supreme Court has faithfully followed this Court's precedents, particularly its recent decision in *Howlett v. Rose*, 496 U.S. 356, 367 (1990), in holding that the court could not refuse to entertain a claim under 42 U.S.C. § 1983 (1988) ("Section 1983") by respondent Bloomingdale's By Mail Ltd. ("By Mail")[1] where By

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[1] Pursuant to Supreme Court Rule 29.1, the Court is advised that Bloomingdale's By Mail Ltd. is a wholly-owned subsidiary of Fed-

Mail's challenge to a tax assessment was properly before the state court. Far from representing a problem that this Court should resolve, the decision below is consistent with virtually all state high court decisions rendered in the period after *Howlett* was decided. Thus, there is no need for the Court's review.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CONSTITUTES A ROUTINE APPLICATION OF THIS COURT'S DECISION IN *HOWLETT v. ROSE*

In *Howlett v. Rose*, 496 U.S. 356, 367 (1990), this Court resolved a persistent conflict concerning whether states were required to entertain Section 1983 claims [2] and held that where a state court would entertain a state-law claim, it cannot refuse to entertain an otherwise identical federal claim under Section 1983. "The Supremacy Clause makes [the Constitution and laws passed pursuant to it] 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett*, 496 U.S. at 367. At issue in *Howlett* was a Florida rule of law which conferred immunity on state governmental entities from federal civil rights actions under Section 1983, even though the entities were not immune in otherwise identical state-law tort actions. This Court found that the scheme impermissibly discriminated against Section 1983 actions: "the Florida court's refusal to entertain one discrete category of § 1983 claims,

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erated Department Stores, Inc., whose securities are publicly traded. Bloomingdale's By Mail Ltd. has no subsidiaries.

[2] *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 234 n.7 (1987); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) (reserving question of whether states are obligated to entertain Section 1983 actions); *Martinez v. California*, 444 U.S. 277, 283-284 n.7 (1980) (same).

when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Id.* at 375.

In the unanimous per curiam decision below, the Tennessee Supreme Court faithfully applied *Howlett*. The court found that it should entertain a claim for relief under Section 1983 by respondent By Mail against petitioners, the Tennessee Commissioner of Revenue (the "Commissioner") and the Attorney General, because By Mail had followed the procedures necessary to establish jurisdiction over its challenge to the assessment.

The case arose when the Commissioner issued an assessment of over $350,000 against By Mail under Tennessee's use tax statute and notified By Mail that it must register as a dealer and collect use taxes on its mail order sales. Following Tennessee's procedures for challenging the assessment, By Mail filed suit in Tennessee chancery court against the Commissioner of Revenue and the Attorney General. By Mail noted that it has no physical presence in the state, alleged that the use tax statute was unconstitutional, *inter alia*, under the Commerce Clause of the United States Constitution and this Court's decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and alleged that the Commissioner's assessment and attempt to force By Mail to register as a dealer violated By Mail's constitutional rights. The chancery court granted summary judgment for the Commissioner, but following this Court's decision in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992) ("*Quill I*"), which reaffirmed *Bellas Hess*, the Tennessee Supreme Court reversed. Pet. App. 12. Petitioners apparently agree that this holding was correct, and seek no review with respect to that decision.

After deciding the merits, the Tennessee Supreme Court turned to the question of attorneys' fees. The court reasoned that, under this Court's decision in *Howlett*, 496 U.S. 356, and *Dennis v. Higgins*, 111 S.Ct. 865 (1991), and its own decision in *L.L. Bean, Inc. v. Bracey*, 817

S.W.2d 292 (Tenn. 1991), "a state court that has subject matter jurisdiction may not deny a party to such proceeding its federal rights. These Federal rights include rights under the Commerce Clause of the U.S. Constitution." Pet. App. 11. The Tennessee Supreme Court found that By Mail had stated a claim under Section 1983,[3] and held that attorneys' fees were recoverable without regard to the 20 percent limit imposed by state law.[4]

This result was clearly correct under *Howlett*. The Tennessee Supreme Court proffered no reason why the State should not entertain By Mail's claim for relief under Section 1983. Nor could it have done so, since it was undisputed that Tennessee courts would and did adjudicate a challenge to the assessment.[5] The Tennessee Su-

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[3] The Tennessee Supreme Court's holding that By Mail's pleadings did not have to explicitly cite Section 1983 in order to state a claim and be entitled to fees under 42 U.S.C. § 1988 (1988) was clearly based on state law and is not subject to review in this Court. Nor do petitioners seek review of this ruling. The court below decided that the pleadings provided sufficient notice under Tennessee's liberal rules, *e.g.*, *Adams v. Carter Cty Memorial Hosp.*, 548 S.W.2d 307, 308-09 (Tenn. 1977) ("[a] short and plain statement of the claim showing that the pleader is entitled to relief, along wtih a demand for damages [sic] is all that is now required"), and in any event the ruling was consistent with this Court's decisions. The same result may well have been mandated by federal law. *E.g.*, *West v. Atkins*, 487 U.S. 42, 48-49 (1988) (Section 1983 claim requires allegations only that defendant denied plaintiff of federal right under color of state law); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (same).

[4] The Tennessee Supreme Court stated that the chancery court "may *not* rely on the Tennessee statute to limit the amount of attorneys' fees that would otherwise be awarded under the Federal statute." Pet. App. 12 (emphasis in original). *See Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980) (noting that 42 U.S.C. § 1988 applies in state courts and is "'an integral part of the remedies necessary to obtain' compliance with § 1983" (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).

[5] Indeed, the Tennessee Supreme Court contrasted the procedural posture of the decision below with that in *L.L. Bean, Inc. v. Bracey*,

preme Court has thus followed *Howlett's* holding that "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'" Pet App. 5, quoting *Howlett*, 496 U.S. at 369-370. Thus, the decision below presents no grounds for review.

II. THE TAX INJUNCTION ACT CANNOT BE READ TO HAVE IMPLIEDLY REPEALED SECTION 1983 IN STATE-COURT TAX CASES

However, petitioners urge that the *Howlett* rule should not apply here because Section 1983 somehow does not apply to state tax cases. *E.g.*, Pet. 6, 11 (attempting to distinguish *Howlett* on the ground that it "was not a tax case and did not involve state officials"). That argument is untenable.

The plain language of Section 1983 "provides a federal remedy for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989) (quoting the statute). Thus, this Court has "repeatedly held that the coverage of the statute must be broadly construed." *Id.*, citing *Felder v. Casey*, 487 U.S. 131, 139 (1988), and *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Furthermore, "[t]he legislative history of the section also stresses that as a remedial statute, it should be 'liberally and beneficently construed.'" *Dennis v. Higgins*, 111 S.Ct. at 868 (1991), quoting *Monell v.*

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817 S.W.2d 292 (Tenn. 1991), where the court had found that a taxpayer who had "not received an assessment, nor . . . paid any taxes that it contested" could not maintain an action under Section 1983 in a Tennessee chancery court. Pet. App. 10-11. The Tennessee Supreme Court in the decision below noted that "[u]nlike the taxpayer in *L.L. Bean*, Bloomingdale's By Mail Ltd. had received an assessment and was properly before the chancery court pursuant to the provisions of § 67-1-1801 *et seq.*" Pet. App. 11.

New York City Dept. of Social Servs., 436 U.S. 658, 684 (1978).[6]

Nevertheless, petitioners advance the extraordinary theory that Congress, by prohibiting *federal* district courts from interfering with State tax schemes in most circumstances through the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1988), intended to repeal Section 1983 (enacted in 1871) as it applies to *state tax* actions. Pet. 13. As Justice Robertson of the Mississippi Supreme Courte noted, that theory "is not only wrong—but absurd." *Marx v. Truck Renting & Leasing Ass'n*, 520 So.2d 1333, 1350 (Miss. 1987) (Robertson, J., concurring).[7]

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[6] Petitioners' assertion that "[t]here is no indication that [Section 1983] was aimed at state tax systems at all" (Pet. 10) is distinctly at odds with this Court's interpretation of the statute. As the Court noted in *Dennis*, it has "given effect to [Section 1983's] broad language, recognizing that § 1983 'provide[s] a remedy, to be broadly construed, *against all forms of official violation of federally protected rights*,'" *Dennis v. Higgins*, 111 S.Ct. 865, 869 (1991) (emphasis added), quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 700-701 (1978).

[7] Justice Robertson's conclusion is shared by many commentators who have addressed the issue. *E.g.*, William L. Taylor *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414, 419 (1985) ("Given that federal courts cannot entertain state tax section 1983 claims and that the remedies under that section are needed to ensure the protection of taxpayers' rights, the assured availability of state courts for these claims is of paramount importance"); Mark S. Poker, *Utilizing Constitutional Torts Against State Tax Officials: Leveling the Playing Field*, 10 Journ. St. Tax'n 63, 69 (1991) ("[t]he application of the Tax Injunction Act to state court proceedings to deny taxpayers a forum denies logic"); Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888 (1990); Note, *Does the Tax Injunction Act of 1937 Affect State Court Jurisdiction Over State Tax Challenges Under Section 1983 of the Civil Rights Act of 1871?*, 45 Wash. & Lee L. Rev. 381 (1988).

The federal Tax Injunction Act, enacted in 1937, 66 years after the Civil Rights Act, provides:

> The *district courts* shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341 (emphasis added). Petitioners concede, as they must, that "[t]he literal terms of the [Tax Injunction] Act address only the federal courts." Pet. 13. State high courts that have evaluated the language, including the Tennessee Supreme Court, have reached the same conclusion. *E.g.*, *L.L. Bean*, 817 S.W.2d at 296 ("[t]he Tax Injunction Act of 1937, by its terms, applies to federal courts and not to state courts"); *Quill Corp. v. North Dakota*, No. Civ. 920283, 1993 WESTLAW 150404 (N.D. May 11, 1993) (*"Quill II"*), Pet. App. 60, 63 (the Act "directly applie[s] only to federal district courts"); *Zizka v. Water Pollution Control Auth.*, 490 A.2d 509, 513 (Conn. 1985) (noting that the Act "does not operate as a jurisdictional barrier in state courts"); *Nutbrown v. Munn*, 811 P.2d 131, 138 (Or. 1991) (noting that neither principles of comity nor the Tax Injunction Act "control[s] state trial procedure"), *cert. denied*, 112 S.Ct. 867 (1992). Thus, the language of the Tax Injunction Act clearly does not support the petitioners' contention that Congress intended to strip state courts of jurisdiction over federal claims.

When seeking Congressional intent, courts generally should not look past the plain language of an unambiguous statute. *E.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) *Maine v. Thiboutot*, 448 U.S. at 6 n.4; *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978). In any event, contrary to petitioners' suggestion (Pet. 13-14), the legislative history of the Tax Injunction Act only confirms its plain language. For example, Senator Bone, the Act's primary sponsor, introduced the bill that became the Tax Injunction Act by saying that the "pro-

posed amendment would affect *the jurisdiction of the district courts of the United States* over suits relating to the collection of state taxes," and that the "purpose of the bill is to *take away the jurisdiction of Federal district courts* . . . ." 81 Cong. Rec. 1415 (1937) (emphasis added). And the House and Senate Reports confirm that the Act was not intended to foreclose taxpayer access to rights based on federal law.[8] On the contrary, as the Mississippi Supreme Court recognized in *Marx*, 520 So.2d at 1346, Congress's enactment of the Tax Injunction Act indeed suggests that Section 1983 claims *should* be brought in state court: "[I]t is the absence of federal jurisdiction under 28 U.S.C., [sic] § 1341 which operates to open the door to the state courthouse so that the taxpayer may there assert his § 1983 claim." *See also id.* at 1350-51 (Robertson, J., concurring).[9]

This Court's recent rulings also demonstrate that the Tax Injunction Act does not strip state courts of jurisdiction over Section 1983 claims in tax cases. The Court has noted that the "plain language" of the Tax Injunction Act "generally prohibits *federal* district courts from

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[8] Congress simply reasoned that because challenges to state taxes generally require interpretation of state law, state-court suits would provide the best vehicle to decide such cases. *See* 81 Cong. Rec. 1417 (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937). Congress did not intend to strip away taxpayers' rights. *See* H.R. Rep. No. 1503, *supra*, at 2 ("the bill does not take away any equitable right of the taxpayer or deprive him of his day in court . . . . A full hearing and judicial determination of the controversy is assured").

[9] Furthermore, petitioners' argument that Congressional "intent and policies" (Pet. 13)—rather than the Supremacy Clause—should govern the issue of whether Section 1983 claims must be enforced in state courts was explicitly rejected in *Howlett*, where the Court rebuffed an argument by *amici* there that "the obligation of state courts to enforce federal law rests, not on the Supremacy Clause, but on a presumption about congressional intent and that Congress should be explicit when it intends to make federal claims enforceable in state court." *Howlett*, 496 U.S. at 370 n.17.

enjoining state tax administration," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512 (1981) (emphasis added), including injunctions under Section 1983 (*id.* at 511), but the Court has explicitly recognized the availability of Section 1983 claims in tax cases in *state* courts. For example, the Court noted in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), that "c[h]allenges to the validity of state tax systems under 42 U.S.C. § 1983 . . . must be brought in state court." *Id.* at 122. And as acknowledged by petitioners (Pet. 28 n.13), in *Fair Assessment in Real State Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), while denying *federal* courts jurisdiction over a Section 1983 challenge to state taxation on grounds of comity, this Court noted that there were remedies available in state court, and explained that the courts of the taxpayer's own home state, Missouri, had "expressly held that plaintiffs such as petitioners may assert a § 1983 claim in state court." *Id.* at 116. In fact, this Court assumed as recently as *Dennis v. Higgins*, 111 S.Ct. 865, and *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), that a Section 1983 claim could be brought in a state-court tax case. *See Dennis*, 111 S.Ct. at 867 (entertaining suit filed in Nebraska state court under Section 1983 for declaratory and injunctive relief); *Arkansas Writers Project*, 481 U.S. at 225 (entertaining suit filed in Arkansas state court for injunctive relief under Section 1983). Thus, it is clear that the Tax Injunction Act does not impliedly repeal or otherwise bar state-court actions based on Section 1983.

III. THERE IS NO PERVASIVE CONFLICT WARRANTING REVIEW BY THIS COURT

There is also no current and pervasive conflict among state high courts warranting this Court's attention. Prior to *Howlett*, state high courts were in conflict about their obligation to entertain Section 1983 actions in state tax cases. Some state high courts had anticipated this Court's

Howlett decision and found that they were obligated to hear properly raised Section 1983 claims. *Burrell v. Mississippi State Tax Comm'n*, 536 So.2d 848 (Miss. 1988); *Allison v. Board of County Commissioners of Johnson County, Kansas*, 737 P.2d 6 (Kan. 1987). Other courts, however, had refused to entertain Section 1983 claims in state tax cases, resting on the mistaken proposition that states may discriminate against Section 1983 claims in state court.[10] For example, petitioners place special emphasis on the South Carolina Supreme Court's decision in *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984), which this Court decided to review but then affirmed by an equally divided Court. *See Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (per curiam). However, *Spencer* relied on the premise that "[t]he United States Supreme Court has not ruled that state courts are required to open their doors to § 1983 actions" (*Spencer*, 316 S.E.2d at 388-389)—the very question which was answered in *Howlett*. Thus, the foundation of those decisions was undermined by this Court in *Howlett*.

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[10] *See Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (S.C. 1984) (discussed in text), *aff'd by equally divided Court*, 471 U.S. 82 (1985); *Linderkamp v. Bismark School Dist. 1*, 397 N.W.2d 76, 80 n.5 (N.D. 1986) (citing this Court's decision in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116-17 (1981) for "dicta" that "a § 1983 challenge to state taxation might be cognizable in state court," but concluding that the Court had not ruled "that state courts are required to entertain § 1983 challenges to state taxation"); *Zizka v. Water Pollution Control Auth.*, 490 A.2d 509, 513 (Conn. 1985) (finding that the State "may impose limitations" on state court Section 1983 claims like those imposed on federal courts by the Tax Injunction Act); *Backus v. Chivilis*, 224 S.E.2d 370, 373-374, 375 (Ga. 1976) (declining "under Georgia law" to hear the action in state court); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (mistakenly relying on the principle of comity to hold that tax challenges under Section 1983 may be treated specially and are therefore not available in state court).

Since *Howlett*, virtually all of the state high court decisions addressing the issue have been consistent with the decision below. Although petitioners allege that the Wisconsin, Oregon, and Kansas supreme courts have reached decisions "fundamentally at odds" with the decision below (Pet. 27 n.11), actually the decisions of those courts are entirely consistent with the Tennessee Supreme Court's holding. The Wisconsin Supreme Court in *Hogan v. Musolf*, 471 N.W.2d 216 (Wis. 1991), *cert. denied*, 112 S.Ct. 867 (1992), faced a taxpayer refund suit asserting claims under both state law and Section 1983. The court noted "that as a general rule, the courts of this state must entertain sec. 1983 claims." *Hogan*, 471 N.W. 2d at 224. However, the court noted that under Wisconsin law, the circuit courts were without jurisdiction to hear tax refund claims of any sort unless the taxpayer had first exhausted administrative remedies. *Id.* at 225. Thus, the court did not shirk its general obligation to entertain a properly-raised Section 1983 claim in tax cases: it merely recognized that under Wisconsin law, "plaintiffs who challenge the administration of [the state's] taxing statutes must exhaust available state administrative remedies *before* commencing a sec. 1983 claim in the courts of this state." *Id.* at 226 (emphasis added). The Oregon Supreme Court reached essentially the same result in *Nutbrown v. Munn*, 811 P.2d 131, as did the Kansas Supreme Court in *Dean v. State*, 826 P.2d 1372 (Kan.), *cert. denied sub nom. Zarda v. Kansas*, 112 S. Ct. 2941 (1992). These decisions are consistent with the Tennessee Supreme Court's decision below on the issue raised by the petition: state courts are obligated to entertain claims under Section 1983 when those claims are properly presented to a court with adequate jurisdiction.

Petitioners correctly note (Pet. 24) that *Quill II*, is in conflict with the decision below. However, in *Quill II*, the North Dakota Supreme Court badly misread *Howlett* and reached a result plainly at odds with this Court's precedents.

In *Howlett*, the Court noted that Florida's choice to refuse jurisdiction over Section 1983 claims but entertain otherwise identical state-law claims violated the Supremacy Clause. *Howlett*, 496 U.S. at 375. Yet in face of that holding, the North Dakota Supreme Court in *Quill II* rejected Quill Corporation's claim for declaratory and injunctive relief under Section 1983 even while noting that identical *state law* declaratory judgment and injunctive actions could be entertained to challenge state taxes. *See* Pet. App. 62-63 (approving the result in *Linderkamp v. Bismark School Dist. No. 1*, 397 N.W.2d 76 (N.D. 1986), where "the district court granted summary judgment under the [North Dakota] Declaratory Judgment Act and enjoined certain practices by the school district, but dismissed the § 1983 claim and refused to award attorney's fees"). Thus, although the North Dakota Supreme Court believed that its decision was consistent with the Tennessee Supreme Court decision below (Pet. App. 71 n.2), the *Quill II* decision approved the very discrimination against federal claims rejected by this Court in *Howlett*.

While this Court can and should correct the North Dakota Supreme Court's erroneous view of the law in *Quill II* as it did in *Quill I*, the Court need not review the decision below, which was correctly decided under this Court's precedents.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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